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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

PACE DIVERSIFIED CORPORATION,

Petitioner,

SUPERIOR COURT OF KERN COUNTY,

Respondent;

NATIONAL PETROLEUM ASSOCIATES, et
al.,

Real Parties in Interest.

F068601

(Super. Ct. No. S-1500-CV-279640)

OPINION

ORIGINAL PROCEEDING; petition for writ of mandate. Sidney P. Chapin, Judge.

Darling & Wilson and Joshua G. Wilson for Petitioner.

No appearance for Respondent.

Bright and Brown, James S. Bright, Maureen J. Bright, and Brian L. Becker;
Clifford & Brown and Grover H. Waldon for Real Parties in Interest National Petroleum
Associates and Macpherson Oil Company.

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An oil and gas property known as the Gardner Fee was conveyed by James C. Thomas III and Mary Ann Thomas (the Thomases) to National Petroleum Associates (NPA) in 1982. Two years later, the parties entered into and recorded an oil and gas

lease known as the Gardner Lease, whereby the Thomases acquired the mineral rights to the Gardner Fee as lessees. In 2000, the Thomases conveyed their interest in the mineral rights to Pace Diversified Corporation's (Pace) predecessor in interest, who conveyed them to Pace. Pace has produced oil from the Gardner Fee continuously since 2000. In 2013, NPA demanded Pace pay royalties under the Gardner Lease. Pace made payment under protest and filed this action against NPA and its general partner, Macpherson Oil Company (MOC) (collectively Macpherson).

The original complaint asserted, among other things, that NPA was not the lessor of the Gardner Lease because it had transferred the property and mineral rights to Fred and Betty Albitre (the Albitres), and on that basis sought to quiet title with Pace as the lessee and the Albitres as the lessors. Pace alternatively alleged that, if NPA was the lessor, Pace was subject to the Gardner Lease as lessee but it was excused from paying royalties due to a settlement agreement between NPA and the Thomases, and therefore NPA breached the Gardner Lease by attempting to terminate it without justification.

Pace filed a first amended complaint (FAC) adding causes of action for adverse possession and prescriptive easement on the theory it held the mineral estate adverse to NPA. Macpherson demurred, arguing Pace was bound by its judicial admission in the original complaint that as lessee, it was in peaceful possession of the Gardner Fee. The trial court agreed and sustained the demurrer to these causes of action without leave to amend. The trial court overruled the demurrer as to the causes of action based on Pace's allegations that it is the lessee under the Gardner Lease.

In its petition for writ of mandate, Pace contends that its allegations in the original complaint that it is the lessee are not admissions, but rather are either legal contentions, or conclusions of fact or law, and therefore it is entitled to plead inconsistent theories. On that basis, it asserts it has adequately pled adverse possession and prescriptive easement but, if not, it can amend the first amended complaint to state such claims. While we conclude that the trial court properly sustained the demurrer to the adverse

possession claims, we agree with Pace that it should have been given an opportunity to amend the first amended complaint. Accordingly, we grant Pace's petition for writ of mandate and reverse the trial court's order sustaining the demurrer to the first and second causes of action without leave to amend.

FACTUAL AND PROCEDURAL BACKGROUND

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we assume the truth of all facts properly pleaded in order to determine whether a cause of action is stated. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579.) Facts appearing in exhibits attached to the complaint are also accepted as true and given precedence over inconsistent allegations in the complaint. (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505; *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447.) We do not assume the truth of contentions, deductions or conclusions of fact or law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 (*Moore*).) In accordance with these rules, we recite the facts as taken from the FAC.

On July 31, 1956, Union Oil Company of California (Union Oil) acquired title to 120 acres of land in the Mount Poso Oil Field in Kern County known as the "Gardner Fee." On December 1, 1971, Union Oil conveyed the Gardner Fee by grant deed to the Thomases, excepting and reserving from it a right of way for ditches and canals constructed by the authority of the United States. The conveyance was recorded in Kern County's official records. At that time, there were three producing oil wells and one idle well on the property.

On March 24, 1982, the Thomases, doing business as Thomas Oil Company, quitclaimed the Gardner Fee to NPA; the deed was recorded in Kern County's official records. At that time, the Thomases owned and operated four wells on the property. On June 22, 1984, NPA and "Thomas Oil Co., a dba of James C. Thomas and Mary Ann

Thomas” (Thomas Oil) entered into an “Oil and Gas Lease” of the Gardner Fee for the purpose of “exploring for, drilling for and producing and removing petroleum oil and gas and other hydrocarbon substances therefrom and the uses and purposes incidental thereto” (the mineral rights). A copy of the June 22, 1984 Oil and Gas Lease (the Gardner Lease) is attached as an exhibit to the FAC and incorporated by reference. The Gardner Lease was recorded on December 12, 1985.

The Gardner Lease provides for a 16% royalty payment to the lessor “on all oil produced and removed from the drillsite area.” It further provides that it will continue “for so long as oil and gas are produced in paying quantities by Lessee from the properties herein leased, subject to the provisions of this Lease for earlier surrender, termination or forfeiture.” Moreover, the Gardner Lease states that the lessor can terminate the lease “[i]n the event Lessee shall fail to pay or deliver royalty at the times and in the manner provided, and such failure shall continue for twenty (20) days after written notice from Lessor, or if Lessee shall fail to perform any other covenant to be kept or performed by Lessee, and such failure continues for thirty (30) days after written notice from Lessor.” In the event of termination, the lessor “shall have the right to re-enter and repossess its land or former estate and remove all persons and property.” The Gardner Lease prohibits assignment without the lessor’s prior written consent.

Three years later, on June 15, 1987, NPA conveyed the Gardner Fee by grant deed to the Albitres. The grant deed (1) excepts from the conveyance “all the oil and gas on said lands and the right to prospect for, mine and remove such deposits from the same upon compliance with ‘certain conditions’ as reserved in the patent from the United States of America, recorded February 9, 1935 in Book 560, Page 398 of official records[,]” and (2) reserves to NPA an easement over all roads for “any and all lawful uses.” The grant deed, which does not mention the Gardner Lease, was recorded in the Kern County official records. On August 21, 2001, the Albitres granted the Gardner Fee to the Albitre Trust, excepting therefrom the same rights in oil and gas that were excepted

from the June 15, 1987 grant deed. This conveyance was recorded in Kern County's official records.

On May 1, 2000, Mary Ann Thomas recorded a document which assigned to Pace Western Corporation, a Delaware Corporation (Pace Western), "all of assignors [sic] rights, title and interest of minerals, in and to that certain oil and gas property, originally conveyed in whole by Grant Deed on July 31, 1956, recorded in Book 2659, Page 586 of the official records of Kern County . . ." (the Thomas assignment). The document does not mention the Gardner Lease. On February 21, 2001, Pace Western assigned the same right, title and interest in the Gardner Fee to Pace. The assignment, which was recorded in Kern County's official records, does not mention the Gardner Lease. While NPA never formally consented to the assignments, it never objected either, despite being constructively aware of them by virtue of their recording, by MOC's substantial operations in and around the surrounding area, which involve its trucks regularly passing by and through the Gardner Fee, and NPA's duty, as the alleged owner of the leasehold estate, to investigate and protect its alleged leasehold.

Pace alleged on information and belief that (1) at some point in time before Pace acquired the mineral rights on the Gardner Fee, NPA and the Thomases entered into an agreement wherein no royalty was due or payable on the Gardner Lease from the existing wells operated before the execution of the lease (the pre-existing wells), and (2) the terms of the Gardner Lease provide no royalty is payable on the minerals produced from the pre-existing wells. Pace further alleged on information and belief that at no time from the inception of the Gardner Lease on June 22, 1984 through May 1, 2000, when Mary Ann Thomas assigned her interests in the oil and gas on the Gardner Fee to Pace Western, did any of the parties operating on the Gardner Fee ever make any royalty payment to NPA pursuant to the Gardner Lease. Neither Pace Western nor Pace made any royalty payments to NPA in relation to the operations on the Gardner Fee.

Since the Thomas assignment to Pace Western, Pace has operated only the four existing wells (three extraction wells and one disposal well), extracting and selling in the market the oil, gas and other hydrocarbons so obtained. Neither Pace nor any prior operators on the Gardner Fee has installed any new wells under the Gardner Lease. In conducting these operations, Pace has maintained the Gardner Fee, and all appurtenances thereon, in good working order and has paid all taxes, licenses, fees and liens associated with its lawful operations on the property.

On March 11, 2013, MOC mailed a “Notice of Default” to Pace, in which MOC asserted it had only just become aware Pace had not made any royalty payments pursuant to the terms of the Gardner Lease. MOC demanded Pace pay all royalties due under the Gardner Lease to cure the alleged default or it would exercise its right to terminate the lease, repossess the land, require Pace to clean and restore the land, and recover all past due royalties.

Pace responded by letter on March 28, 2013, reminding MOC an agreement had been reached as part of a court settlement between Thomas and NPA wherein no royalty was due or payable on the pre-existing wells. Pace enclosed a reconciliation statement along with a check for \$130,667.71, representing royalties under the rate applicable to the Gardner Lease for petroleum products produced from the pre-existing wells for the four years before receipt of the notice of default, which Pace asserted was the statutory period for any legal claim for royalties. Pace stated the royalties were being paid “under protest” and reserved its right to investigate MOC’s allegations and recover any funds that might be due Pace.

On April 11, 2013, MOC responded with another letter acknowledging receipt of Pace’s letter and informing Pace it continued to be in default under the Gardner Lease. MOC asserted Pace became obligated to pay royalties when Thomas assigned the Gardner Lease to Pace. Pace responded on May 2, 2013, reminding MOC that no operator since the inception of the Gardner Lease had made royalty payments based on

the agreement between Thomas and NPA, and the amount remitted, which it paid under protest, was accurate. On June 4, 2013, MOC sent Pace a Notice of Lease Termination and directed Pace to contact MOC to arrange for remediation and surrender of the property to MOC.

The Original Complaint

On June 17, 2013, Pace filed a verified complaint naming NPA, MOC, and The Fred A. Albitre and Betty M. Albitre, 2001 Revocable Trust (the Albitre Trust), as defendants.¹ As “Preliminary Allegations[,]” Pace alleged (1) the case involves questions of rights and remedies relative to the oil and gas rights on the Gardner Fee; (2) it “contends it holds the exclusive rights, as lessee, to, among other things, explore for, drill for and produce and remove petroleum oil and gas and other hydrocarbon substances” on the Gardner Fee “and the uses and purposes incidental thereto”; (3) NPA contends it is the lessor on the Gardner Fee pursuant to the Gardner Lease and it has rightfully terminated Pace’s lease interest; (4) Pace contends the Albitre Trust is the rightful lessor of the oil and gas rights on the Gardner Fee with any rights to terminate Pace’s lease interest; (5) in the alternative, if NPA is the rightful lessor under the Gardner Lease, then Pace contends it has not materially breached the lease agreement; and (6) it made royalty payments to NPA based on NPA’s fraudulent representations.

The complaint contained nine causes of action: (1) quiet title; (2) declaratory relief (property); (3) breach of the covenant of good faith and fair dealing; (4) breach of contract; (5) anticipatory breach of contract; (6) declaratory relief (contract); (7) fraud; (8) negligent misrepresentation; and (9) conversion.

¹ The verification was signed by an officer of Pace. The officer avers that the matters stated in the complaint “are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I am informed and believe that they are true.”

In the first two causes of action to quiet title and for declaratory relief, Pace alleged it is the lessee of the mineral rights on the Gardner Fee, and while NPA claims it is the lessor under the Gardner Lease, Pace contends the lessor is actually the Albitre Trust. Pace sought an order establishing its rights as lessee and the Albitre Trust's rights as lessor, effective May 1, 2000, when Mary Ann Thomas assigned the mineral rights to Pace Western, and a judicial declaration that the Albitre Trust is the rightful lessor and Pace the rightful lessee to the mineral rights on the Gardner Fee.

The third through sixth causes of action for breach of the covenant of good faith and fair dealing, breach of contract, and declaratory relief, were alternative claims should it be established that Pace is the lessee and NPA the lessor under the Gardner Lease. In these causes of action, Pace alleged that by assignment of the Gardner Lease, it entered into an agreement with NPA, which NPA terminated without cause because either Pace was excused from paying royalties for oil and gas produced from the pre-existing wells, or it cured any breach by making four years of royalty payments. Pace further alleged that if NPA had any rights under the lease after its settlement with the Thomases, it either waived those rights by failing to act in the 12-year period that Pace possessed the lease or was estopped from enforcing those rights, and any recovery under the lease was barred by the applicable statute of limitations. Pace asserted NPA "unfairly interfered and threatened to continue to interfere with Pace's rights to receive the benefits of the Gardner Lease."

Pace alleged NPA breached its obligations under the Gardner Lease by unjustly demanding royalty payments prohibited by the settlement and the lease's terms, and terminating the lease without substantial justification. Pace asserted NPA's June 4, 2013 notice of termination created an anticipatory breach of NPA's obligations under the lease. Pace alleged an actual controversy existed between it and NPA concerning whether royalties are due and payable on the Gardner Lease from the pre-existing wells and

whether the royalty payment Pace made must be returned to it, and requested a judicial declaration of the parties' rights, duties and responsibilities on those issues.

In the seventh and eighth causes of action for fraud and negligent misrepresentation, Pace alleged Macpherson falsely represented to Pace that it owed NPA royalties under the Gardner Lease, and Macpherson knew or should have known from the documents recorded as early as June 15, 1987, that NPA held no interest in the Gardner Fee. Finally, in the conversion claim, Pace alleged NPA wrongfully took possession for its own use the royalties paid, \$130,667.71.

The First Amended Complaint

Macpherson demurred to the complaint. Rather than oppose the demurrer, Pace filed a verified FAC. The FAC adds causes of action for quiet title on an adverse possession theory (First Cause of Action) and quiet title on a prescriptive easement theory (Second Cause of Action). The first through ninth causes of action in the original complaint are renumbered as causes of action three through eleven. The allegations in those causes of action essentially are unchanged. Each cause of action incorporates all acts and allegations contained in the paragraphs that precede it.

The FAC contains an expanded list of "Preliminary Allegations," in which Pace contends it exclusively holds the mineral rights on the Gardner Fee as either (1) the owner through adverse possession or prescription, or (2) the lessee. Pace further contends that to the extent it is the "proper lessee of those rights," the Albitre Trust is the lessor. In alleging it is the owner of the mineral rights by adverse possession, Pace contends it has maintained possession of those rights "by actual, open, hostile, continuous, and exclusive possession" since at least 2001; during that time, it has been continuously, exclusively, openly and notoriously producing oil from the Gardner Fee; and it has paid all taxes and assessments levied or assessed against the petroleum gas and oil extracted from the Gardner Fee. Pace alleges on information and belief that Macpherson claims a right to possess an interest in the mineral rights adverse to Pace and

that the Albitre Trust may also have an adverse claim of right. Based on these same allegations, Pace alternatively alleges it is the owner of an exclusive easement of the mineral rights by prescription, which it acquired by actual, open, hostile, continuous and exclusive occupation, use and possession. Pace repeats these allegations in the First and Second Causes of Action to quiet title by adverse possession and by prescriptive easement.

Pace further alleges in the preliminary allegations that it contends: (1) it is not a party to the Gardner Lease and it holds the mineral rights in fee; (2) if Pace's interests "are in the nature of a lease," the rightful lessor is the Albitre Trust; and (3) if NPA is the rightful lessor and Pace is subject to the Gardner Lease, it has not materially breached the lease.

The Demurrer

Macpherson demurred to the FAC on the ground that all eleven causes of action failed to allege facts sufficient to state a cause of action. Macpherson contended Pace's claims of adverse possession and prescriptive easement fail because (1) a lessee under a lease is presumed to be a peaceful possessor of the lessor's property by the lessor's consent; (2) to acquire title by adverse possession or prescriptive easement, a lessee must show it repudiated its lease by providing notice to the lessor and thereafter adversely and hostilely remaining in possession of the property in an open and continuous manner for five years; (3) by Pace's own "judicial admissions in its verified original Complaint," Pace held the mineral rights as lessee of a lease that has not terminated; and (4) these admissions are inconsistent with any belated attempt to allege it repudiated the Gardner Lease and possessed the mineral rights adversely. Therefore, Macpherson argued, Pace cannot state claims for adverse possession or prescriptive easement.

Macpherson argued the causes of action premised on Pace's claim that NPA does not own the mineral estate under the Gardner Lease and therefore the Albitre Trust is the true lessor, specifically the third, fourth, ninth, tenth and eleventh causes of action for

quiet title (lease), declaratory relief, fraud, negligent misrepresentation and conversion respectively, fail as a matter of law. Macpherson contended that, contrary to Pace's allegations, the 1987 grant deed from NPA to the Albitres effectively reserved the mineral rights in the Gardner Fee; therefore, NPA continued to be the lessor under the Gardner Lease. Macpherson also argued Pace's allegation that the grant of the surface estate to the Albitres necessarily meant the Gardner Lease, including the right to receive royalties, automatically transferred to the Albitres was contrary to the law, as covenants that are appurtenant to the mineral estate run with the mineral estate, i.e. the rights related to royalties in oil and gas leases are appurtenant to and run with the owner of the oil and gas interests.

Macpherson next contended the fifth, sixth, seventh and eighth causes of action for breach of the covenant of good faith and fair dealing, breach of contract, anticipatory breach and declaratory relief respectively, which are fundamentally based on the premise that Pace is not required to pay royalties for production from wells that pre-existed the Gardner Lease, also fail as a matter of law. Macpherson argued (1) the express terms of the Gardner Lease contradict Pace's alleged interpretation and require the payment of royalties, and (2) Pace has not alleged properly the purported agreement between NPA and the Thomases that it claims exempted the lessee from paying royalties on pre-existing wells. Finally, Macpherson raised additional arguments as to why certain causes of action that are not at issue here fail.

Pace opposed the demurrer. With respect to the first and second causes of action to quiet title based on adverse possession and prescriptive easement, Pace argued it has the right to plead inconsistent legal theories. Pace asserted it did precisely that when it added these two claims as alternatives to claims in which it alleges it holds an interest in the Gardner Fee as a lessee; Pace argued the two legal theories, i.e. it is the owner or it is the lessee, are not factually contradictory because both are supported by the underlying essential facts alleged in both the original complaint and the FAC, which had not

materially changed. Pace also asserted Macpherson's argument that Pace's allegation that it is a lessee is automatically contradictory to adverse possession is an improper legal conclusion and unsupported by the facts, as Pace never alleged that its right to enter the Gardner Fee for producing and removing oil and gas was ever permissive or with consent, and it has always alleged that right is adverse as to Macpherson.

Pace asserted it properly pled the third, fourth, ninth, tenth and eleventh causes of action based on the allegation that NPA is not the rightful lessor of the Gardner Fee because the 1987 grant deed is ambiguous and therefore, on demurrer, the court must accept Pace's interpretation as true, i.e. that the parties did not intend to reserve to NPA the rights to oil and gas underlying the Gardner Fee. It also argued the other facts in the FAC alleging NPA does not hold oil and gas rights underlying the Gardner Fee must also be accepted as true.

Pace argued the remaining causes of action, the fifth, sixth, seventh and eighth, which are based on the allegation that Pace is not required to pay royalties under the Gardner Lease, also survive demurrer because (1) the facts alleged in the FAC regarding Pace's interpretation of the Gardner Lease must be accepted as true; and (2) it was not required to plead the terms of the agreement between NPA and the Thomases because it is not the subject of any breach of contract claim.

Pace requested leave to amend the FAC. While Pace did not state how it could amend the FAC, it requested the trial court to grant it leave should it find Pace had insufficiently pled any cause of action.

Following oral argument on the demurrer, the trial court took the matter under submission. The day after oral argument, Pace sent a letter brief to the trial court in which it submitted case authority for the proposition that contradictory facts can be pled in a subsequent complaint and asked for an opportunity to amend its pleading to adequately explain the apparent factual contradiction. In response, Macpherson submitted a letter brief objecting to Pace's "unsolicited sur-reply" and argued that even if

the court were to consider it, the sur-reply does not provide any basis for overruling the demurrer with respect to Pace's claims for adverse possession and prescriptive easement, or granting Pace leave to amend.

In a minute order, the court sustained the demurrer to the first (Quiet Title – adverse possession), second (Quiet Title – prescriptive easement), third (Quiet Title – lease), fourth (declaratory relief – property), ninth (fraud), tenth (negligent misrepresentation) and eleventh (conversion) causes of action without leave to amend. It overruled the demurrer to the fifth (breach of the covenant of good faith and fair dealing), sixth (breach of contract), seventh (anticipatory breach of contract) and eighth (declaratory relief – contract) causes of action.

Pace petitioned this court for a writ of mandate, challenging the trial court's order sustaining the demurrer without leave to amend only as to the first, second, third and fourth causes of action in the FAC. We issued an alternative writ directing the trial court to either vacate its order sustaining the demurrer and issue an order overruling the demurrer only as to the first and second causes of action of the FAC, or show cause why the requested relief should not issue. The trial court elected to show cause.

DISCUSSION

Standard of Review

A general demurrer presents the same question to the appellate court as to the trial court, namely, whether the plaintiff has alleged sufficient facts in the complaint to justify relief on any legal theory. (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1811-1812.) The “complaint must be liberally construed to afford plaintiff [his or] her day in court and render substantial justice between the parties.” (*Cooper v. National Railroad Passenger Corp.* (1975) 45 Cal.App.3d 389, 393, disapproved on other grounds in *Ewing v. Cloverleaf Bowl* (1978) 20 Cal.3d 389, 401, fn. 8.) A demurrer is properly granted when the pleadings fail to state facts sufficient to

constitute a cause of action. (Code Civ. Proc., § 430.10, subd. (e).)² Regardless of the label attached to the cause of action, the court must examine the complaint's factual allegations to determine whether they state a cause of action on any available legal theory. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46 Cal.App.4th 554, 560.)

An appellate court presumes that the judgment appealed from is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We adopt all intendments and inferences to affirm the judgment unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583-584.) An appellant has the burden of overcoming the presumption of correctness. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1207.) Even when the appellate court is required to conduct a de novo review, review "is limited to issues which have been adequately raised and supported in [the appellant's] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) It is the appellant's burden to demonstrate the trial court sustained the demurrer erroneously. (*Smith v. County of Kern* (1993) 20 Cal.App.4th 1826, 1829-1830.)

The Claims of Adverse Possession and Prescriptive Easement

In its first and second causes of action seeking to quiet title to the mineral rights by adverse possession and prescriptive easement, Pace alleges that it maintained possession of the mineral rights by actual, open, hostile, continuous and exclusive possession since at least 2001, during which time it continuously, exclusively, openly and notoriously produced oil from the Gardner Fee and paid all taxes and assessments levied or assessed against the minerals it extracted. In the remaining causes of action, namely the fifth through eighth causes of action, however, Pace alleges that by assignment of the Gardner Lease, it has an agreement with NPA, and is thereby subject to the Gardner Lease as lessee. Pace asserts it can maintain both claims of ownership and that it is the lessee and can plead alternative theories because the alleged facts do not preclude either theory, and

² Undesignated statutory references are to the Code of Civil Procedure.

are consistent between the original complaint and the FAC. Macpherson counters that Pace's admissions in both complaints that it held the mineral rights as lessee under the Gardner Lease and that it is a party to that lease negate the element of hostile intent required to maintain the claims for adverse possession and prescriptive easement.

"The elements of adverse possession are as follows: '(1) Possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner. (2) It must be hostile to the owner's title. (3) The holder must claim the property as his own, *under either color of title or claim of right*. (4) Possession must be continuous and uninterrupted for five years. (5) The holder must pay all the taxes levied and assessed upon the property during the period.'" (*Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1110.) To establish the elements of a prescriptive easement, the claimant must prove use of the property for the statutory period of five years, which use has been (1) open and notorious, (2) continuous and uninterrupted, (3) hostile to the true owner, and (4) under a claim of right. (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.)³

The issue here is whether Pace has alleged the element of hostility. The requirement of hostility "does not mean that the parties have an actual dispute over the title, but merely that the claimant's possession is without recognition of any rights of the true owner." (Miller & Starr, § 16:13, p. 34; *Estate of Williams* (1977) 73 Cal.App.3d 141, 147.) For a claimant's possession to be adverse and hostile under a claim of right, "it must be wrongful to the true owner, without authority, consent, or permission, against the owner's will, and without recognition of the owner's rights." (Miller & Starr, § 16:13, p. 35; § 325.)

³ An easement is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land. (6 Miller & Starr, Cal. Real Estate (3d ed. 2011) (Miller & Starr) § 15:1, p. 5.) Easements may be created in a number of ways, including express grant and prescription. (*Id.* at § 15:13, pp. 60–63.)

“[T]he grant of adverse possession or a prescriptive easement requires not innocent intent, but an intent to dispossess the owner of the disputed property, whether the encroacher is acting deliberately or negligently.” (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 770.) “[T]he requisite hostile possession and claim of right may be established when the occupancy or use occurred through mistake.” (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 322.) Thus, a claimant who openly occupies another’s land for the statutory period in the mistaken belief he, and not someone else, is the owner, and pays all taxes levied against the land, acquires title by adverse possession. (*Newman v. Cornelius* (1970) 3 Cal.App.3d 279, 289; *Sorensen v. Costa* (1948) 32 Cal.2d 453, 459.) A claimant’s use or occupancy will not be deemed hostile to another’s rights, however, if the claimant simultaneously acknowledges those rights. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 940.)

As Macpherson points out, and Pace acknowledges, as a general rule, “a lessee in possession of real property under a lease cannot dispute his landlord’s title nor can he hold adversely to him while holding under the lease.” (*Swartzbaugh v. Sampson* (1936) 11 Cal.App.2d 451, 462; see also *Harvey v. Nurick* (1968) 268 Cal.App.2d 213, 215-216.) In order to acquire an interest in the property adverse to the landlord, a tenant must repudiate the lease and remain in possession adversely for five years thereafter. “When the tenant clearly and unequivocally repudiates the landlord’s title and the tenancy relationship, thereby making a personal claim of title, and the landlord is given clear notice of this fact, the tenant’s possession possibly becomes hostile and adverse to the landlord.” (Miller & Starr, § 16:39, pp. 97-98; § 326.) A tenant who is in possession under a lease from someone other than the true owner, however, may be able to establish a prescriptive title against the true owner. (Miller & Starr, § 16:39, p. 98; *Millett v. Lagomarsino* (1895) 107 Cal. 102, 105-106.)

Here, the FAC alleges that through the 1984 Gardner Lease, the Thomases became the lessee of the mineral rights on the Gardner Fee with NPA as the lessor; in 1987, NPA

reserved the mineral rights when it conveyed the Gardner Fee to the Albitres by grant deed; and in May 2000, Mary Ann Thomas assigned her interest in the mineral rights to Pace Western, which subsequently assigned them to Pace.⁴ The FAC further alleges all of the documents were recorded. These facts, which are incorporated into the first and second causes of action, establish that Pace was the lessee of the mineral rights under the Gardner Lease by assignment, with NPA as the lessor. As lessee, Pace cannot maintain an action for adverse possession or prescriptive easement unless it repudiated the lease or the lease was terminated, as it cannot establish the requisite hostility or claim of right. The FAC contains no allegations of termination or repudiation.

While Pace recognizes that a lessee cannot challenge the title of his landlord, it argues hostility may be established through mistake, which is shown by its allegation that no royalties were due on the four wells on the Gardner Fee due to the agreement between NPA and Thomas, which NPA denies exists. Pace explains: “If [Pace] honestly believed that it owed no royalties only because of an agreement that Thomas had and there was no such agreement[,], then [Pace]’s mistake led it to extract oil and gas against the interests of the record title owner. . . . Hostility is demonstrated because [Pace]’s use and occupation is hostile to the interests and rights of the record owner[,], not because [Pace meant] to be hostile.” But being mistaken about whether royalties are due is not a mistake about whether Pace owned the mineral rights. These allegations do not negate Pace’s allegations that it was the lessee under the Gardner Lease.

Here, since Pace has alleged it is the lessee of the Gardner Lease, its possession of the mineral rights cannot be hostile or adverse because its possession is with NPA’s

⁴ While Pace alleged in the FAC that NPA did not reserve the mineral rights underlying the Gardner Fee in the 1987 grant deed to the Albitres, thereby making the Albitres the lessor of the mineral rights, the trial court rejected this contention when it sustained the demurrer to the third and fourth causes of action which were based upon this allegation. Although Pace sought review of this ruling by this petition for writ of mandate, we declined to review it. Accordingly, the theory is no longer viable under the FAC.

permission and consent. (Miller & Starr, § 16:13, p. 35, fns. omitted [“Possession with permission and consent of the owner is neither hostile nor adverse. Possession that commences with the owner’s permission does not become hostile or adverse until the possessor has disclaimed the interests of the owner and has given the owner distinct notice of the hostile character of the possession.”].) Accordingly, the trial court did not err when it sustained the demurrer to the first and second causes of action.

Leave to Amend

When a demurrer has been sustained properly and leave to amend the pleading has been denied, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*).)

Pace contends the trial court abused its discretion in sustaining the demurrer to the first and second causes of action of the FAC without leave to amend. While it is Pace’s burden to show how the complaint can be amended, this showing need not be made to the trial court; Pace may make this showing for the first time on appeal. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1386 (*Careau*); § 472c, subd. (a).) To meet this burden, Pace must show in what manner the pleading can be amended and how such amendments will change the legal effect of the pleading. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349; *Careau, supra*, 222 Cal.App.3d at p. 1388.) The assertion of an abstract right to amend does not satisfy this burden. (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th 151, 161, superseded by statute on a different point in *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637, fn. 8.) Pace must set forth factual allegations that sufficiently state all required elements of a cause of action. (*McMartin v. Children’s Institute International* (1989) 212 Cal.App.3d 1393, 1408.) Allegations must be factual and specific, not vague or

conclusory. (*Cooper v. Equity Gen. Insurance* (1990) 219 Cal.App.3d 1252, 1263-1264.) Where a plaintiff offers no allegations to support the possibility of amendment, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. (*New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co.* (1992) 7 Cal.App.4th 1088, 1098; see *HFH, Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 513, fn. 3.)

Pace contends it can amend the complaint to allege additional facts to supply the requisite hostility needed to allege causes of action for adverse possession and prescriptive easement. These facts are taken from Macpherson's cross-complaint, which alleges that the Thomases "shut-in production on the Gardner Fee Property after 1985 due to the severe drop in oil prices that occurred in the mid-1980s, and kept production shut-in for approximately a decade and, accordingly, after such shut-in, Macpherson did not receive royalty payments from Thomas, as there was no oil production."

Based on these facts, Pace asserts it can amend the FAC to plead that when the wells on the Gardner Fee were shut-in in 1985 and production stopped, the Gardner Lease terminated pursuant to section 1.2, which provides: "This Lease shall continue for so long as oil and gas are produced in paying quantities by Lessee from the properties herein leased, subject to the provisions of this Lease for earlier surrender, termination or forfeiture." Section 1.2 is an habendum clause, which creates a determinable fee interest in a *profit à prendre* that terminates upon the happening of the event named in the lease; "no notice is required for, and no forfeiture results from, such termination." (*Renner v. Huntington-Hawthorne Oil & Gas Co.* (1952) 39 Cal.2d 93, 98 (*Renner*).)

Pace further asserts that five years after the Gardner Lease terminated, under section 326,⁵ continued possession of the mineral estate by the lessee was no longer

⁵ Section 326 provides: "When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, . . . notwithstanding that such tenant may have acquired another title, or may have claimed to

deemed peaceful and the former lessee could establish title by adversely possessing the property for another five years. Pace states that even if possession of the mineral estate is not deemed to begin until production restarted, Pace Western began producing oil from the four wells in May 2000 upon assignment from Mary Ann Thomas, and Pace produced oil for the next 13 years. Pace reasons that because it was not a party to Gardner Lease, the assignment does not mention the Gardner Lease, and the Gardner Lease was effectively terminated in 1985, Pace's "continuous production of oil from the Gardner Fee is a classic case of adverse possession."

Macpherson contends Pace's proposed amendment will not cure the defect in the FAC because: (1) the new allegations would contradict the allegations in Pace's verified original complaint that Pace took possession and operated on the Gardner Fee as the lessee under the Gardner Lease, which established that Pace did not have the hostile intent necessary to support its claims of adverse possession or prescriptive easement; (2) regardless of the history of oil production under the Gardner Lease, the lease was reinstated as a month-to-month lease when Pace tendered a royalty payment to Macpherson, which it accepted; and (3) Pace has not provided satisfactory evidence that shows the allegations of its original complaint resulted from mistake or inadvertence with respect to the production history of the pre-existing wells.

Macpherson's first argument is based on its assertion that Pace's proposed amendment that it was never the lessee of, or a party to, the Gardner Lease, violates the rule that a pleader cannot allege contradictory or antagonistic facts in a verified pleading. Even if the Gardner Lease expired, Macpherson argues, Pace admitted in the original verified complaint that it entered and operated on the Gardner Fee under the Gardner Lease, and therefore Pace could not have had the requisite hostile intent toward the

hold adversely to his landlord. But such presumptions cannot be made after the periods herein limited."

owner's title or claim the property as its own. Macpherson asserts Pace cannot contradict its admissions in an amended complaint.

A plaintiff may plead inconsistent counts, which “usually constitute a pleading of the same cause of action according to different legal theories or different versions of ultimate facts.” (4 Witkin, Cal. Proc. (5th ed. 2008) § 402, p. 542.) A plaintiff may plead “the same cause of action in varied and inconsistent counts with strict legal propriety” where “the exact nature of the facts is in doubt, or where the exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to the plaintiff.” (*Ibid.*)

The ability to plead inconsistent counts, however, may be limited by the factual allegations made in a verified complaint. As our Supreme Court has explained: “[A]lthough a plaintiff may plead inconsistent counts or causes of action in his complaint [citation] even where, as here, it be verified, if there are no contradictory or antagonistic facts [citations], we are in accord with the view stated by the court in the *Beatty* case [*Beatty v. Pacific States S. & L. Co.* (1935) 4 Cal.App.2d 692, 697] that the rule was not ‘intended to sanction the statement in a verified complaint of certain facts as constituting a transaction in one count or cause of action, and in another count or cause of action a statement of contradictory or antagonistic facts as constituting the same transaction. In short, the rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of facts of which he purports to speak with knowledge under oath.’” (*Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 328 (*Faulkner*).)

What constitutes contrary or antagonistic allegations under this rule is not entirely clear. In *Steiner v. Rowley* (1950) 35 Cal.2d 713 (*Steiner*), plaintiff-buyers sued a real estate broker to recover \$2,000 the broker purportedly received from the sellers for successfully recommending the plaintiffs buy their property. The first count alleged the broker was paid the money for the buyers' use and benefit, as it was “a side payment and

secret profit . . . in consideration of receiving from [him] . . . a favorable recommendation for the purchase of certain property[,]” which “payment . . . was obtained . . . in violation of [the broker’s] duty to deal with plaintiffs honestly and fairly. . . .” (*Id.* at pp. 715-716.) The third count alleged the broker “received a secret profit of \$2,000 out of a certain escrow pursuant to instructions given by . . . the grantees of the property. . . .” (*Id.* at p. 716.)

Our Supreme Court reversed a dismissal of the action and directed the trial court to overrule the demurrer on these claims. (*Steiner, supra*, 35 Cal.2d at p. 721.) After noting that notice of the contents of an escrow agreement is imputed through the escrow holder to the parties, the Court explained: “But even if the facts pleaded in [the third] count show knowledge of the secret purpose of the payment, the first count would not fall because of those allegations. Concededly, all of the counts are based upon the same transaction. A complaint may plead inconsistent causes of action [citations], although it be verified, if there are no contradictory or antagonistic facts [citation]. Here the allegations in the first count to the effect that the profit was secret at most would be inconsistent with, but not antagonistic to, those of the . . . count in regard to the payments out of escrow. Upon trial, evidence offered in support of the first count may tend to prove the invalidity of the escrow contract, ambiguity in its terms, or mistake in connection with its execution. If, for any reason, this agreement is invalid, then the [plaintiffs] are not by imputation bound through knowledge of its provisions.” (*Id.* at pp. 718–719.)

Macpherson argues Pace’s allegations that it is a lessee prohibit Pace from alleging in an amended pleading that it is the owner of the mineral rights under adverse possession. The facts alleged in the original complaint consisted of the recorded documents, including the Gardner Lease and Thomas assignment. Based on these documents, Pace alleged two alternative theories: (1) it was the lessee under a lease with the Albitre Trust; or (2) it was the lessee under the Gardner Lease. While Pace did allege

in the preliminary allegations that it holds the mineral rights exclusively as a lessee, the allegation was a contention, not a fact. Pace also alleged that its title to the mineral rights was as lessee under the quiet title cause of action that asserted the Albitre Trust was the lessor. This allegation, even if one of fact, is not contradictory to an allegation of adverse possession against Macpherson because Pace still can possess adversely to NPA if the Albitre Trust is not the true owner of the mineral rights. (Miller & Starr, § 16:39, p. 98.)

Pace also alleged in the third through sixth causes of action of the original complaint that it was the lessee under the Gardner Lease by assignment, with NPA as the lessor. But that allegation was in the alternative to its allegation that it was a lessee under a lease with the Albitre Trust. For this reason, the allegation was a contention based on the same alleged facts, i.e. the documents, not a factual assertion to which the doctrine stated in *Faulkner, supra*, 40 Cal.2d at p. 328, applies.

Macpherson asserts the allegation that Pace is the lessee is an ultimate fact, and therefore an admission.⁶ But even if it is an ultimate fact for the purpose of alleging certain causes of action against Macpherson based on the Gardner Lease, that does not necessarily mean it is an admission of fact that precludes alleging an inconsistent theory

⁶ Evidentiary facts are “[t]hose facts which are necessary for determination of the ultimate facts; they are the premises upon which conclusions of ultimate facts are based.” (Black’s Law Dictionary (5th ed. 1979) p. 500.) “Ultimate facts are the logical conclusions deduced from [evidentiary facts].” (*Rhode v. Bartholomew* (1949) 94 Cal.App.2d 272, 279 [*Rhode*].) The difference between ultimate and evidentiary facts ““involves at most a matter of degree.”” (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) A complaint must contain only allegations of ultimate facts as opposed to allegations of evidentiary facts or of legal conclusions or arguments. (*Burke v. Superior Court* (1969) 71 Cal.2d 276, 279, fn. 4.) An allegation or finding that a person is the owner of certain property is an allegation or finding of an ultimate fact. (*Gossman v. Gossman* (1942) 52 Cal.App.2d 184, 192-193; see also *French v. Brinkman* (1963) 60 Cal.2d 547, 549 [where a party alleges his ownership of real estate in an action to quiet title, a finding that he was or was not such owner is a finding of ultimate fact, not a conclusion of law].)

based on facts that are not contradictory or antagonistic.⁷ Adding an allegation to the FAC that the Thomases shut-in production of the wells in 1985 is not antagonistic or contradictory to the other facts that were alleged in either the original complaint or FAC. Based on the facts, Pace can allege alternative theories of (1) ownership of the mineral rights by adverse possession because the lease terminated before the Thomas assignment, or (2) that it is the lessee under the Gardner Lease. While these theories are inconsistent and Pace may be required to make a timely election of remedies, an election cannot be forced by demurrer. (*Steiner, supra*, 35 Cal.2d at p. 720.)

Since the allegation that Pace is a lessee does not preclude an allegation that it is the owner by adverse possession under the same set of facts, Pace should be given leave to amend to allege the fact that the Thomases shut-in the well in 1985 and the legal effect of that fact.

Macpherson next contends Pace's allegations demonstrate that the Gardner Lease was reinstated as a month-to-month lease when Macpherson accepted Pace's tender of a royalty payment. In support, Macpherson cites the general principle that if a lessee holds over after the expiration of his term and his lessor thereafter accepts monthly rental payments in the amount the lessee had been making under the lease, the lessee becomes a month-to-month tenant. (*Renner, supra*, 39 Cal.2d at p. 102.) This argument fails, however, because if the Gardner Lease terminated by its terms in 1985, Pace was never a lessee under the Gardner Lease and its subsequent adverse possession of the property

⁷An example of when an ultimate fact is deemed to be a binding admission is found in *Rhode, supra*, 94 Cal.App.2d 272, a case involving a claim for a broker's commission. There, the plaintiff alleged in his original verified complaint that the defendants "agreed to pay him for securing a purchaser 'and assisting in any such sale' and that he negotiated with [the prospective purchasers] and their agents and employees 'in respect to the sale and purchase of said stock.'" (*Id.* at p. 278.) During the course of the proceedings, the trial court permitted the plaintiff to strike this language from the complaint. (*Id.* at p. 274.) The Court of Appeal held the amendment contradicted the original allegations, which were of ultimate fact and stood as an admission of the facts alleged. (*Id.* at pp. 278-279.)

meant it was the owner of the mineral estate years before its tender of royalty payments. Pace could not reinstate a lease to which it was never a party. (Civ. Code, § 1945.)

Finally, Macpherson contends Pace should not be given leave to amend because it has not provided satisfactory evidence that shows the allegations of its original complaint were the result of mistake or inadvertence with respect to the production history of the wells. Macpherson asserts Pace knew or should have known the wells did not produce oil before it began operating on the property and therefore cannot show mistake or inadvertence. This assertion is based on the following well-established rule: “[A] proposed amendment which contradicts allegations in an earlier pleading will not be allowed in the absence of ‘very satisfactory evidence’ upon which it is ‘clearly shown that the earlier pleading [was] the result of mistake or inadvertence.’” (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879.) The rule, however, is inapplicable here since, as we have already explained, the proposed amendment does not contradict the allegations of the original complaint.

In sum, Pace should have been given leave to amend its claims of adverse possession and prescriptive easement based on its assertion it can allege the Thomases shut-in production of the wells in 1984 and therefore the Gardner Lease terminated by its terms.

DISPOSITION

The petition for writ of mandate is granted. This court's alternative writ of mandate, filed February 5, 2014, is discharged. Let a peremptory writ of mandate issue directing respondent superior court to vacate its order sustaining the demurrer to the first and second causes of action without leave to amend and enter a new order sustaining the demurrer to the first and second causes of action with leave to amend. The parties shall bear their own costs.

Gomes, J.

WE CONCUR:

Levy, Acting P.J.

Cornell, J.